No. 4496

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 2

ALEXANDER B. STEWART, et al.,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, ALEXANDER B. STEWART.

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I.

STATEMENT OF THE CASE.

The plaintiff in error, Alexander B. Stewart, who will be termed hereinafter as the defendant, was indicted by the Grand Jury of the Southern Division of the United States District Court, for the Southern District of California, with twelve others on the 13th day of June, 1924. The indictment contained four counts. The first count charged the defendants with a violation of Section 37 of the Criminal Code of the United States in entering into a conspiracy at or near the City of Los Angeles, County of Los Angeles, in the State and District above set forth, on or about the 1st day

of January, 1923, to violate in two particulars the Tariff Act of 1922 and in three particulars the Act of October 28, 1919. Ten overt acts are pleaded in said count in furtherance of the conspiracy alleged therein. (Trans. Rec., pages 11 to 20.) The second count set forth in the indictment attempted to charge that the defendants did "on or about the 22nd day of March, 1923, at the plant of the Curtis Corporation, in the City of Long Beach, County of Los Angeles, State and District aforesaid, knowingly, wilfully, unlawfully and feloniously and with the intent to defraud the revenues of the United States, smuggle and clandestinely bring into the United States from the Dominion of Canada, certain goods, wares and merchandise, to wit; intoxicating liquors containing alcohol in excess of one-half of one per cent by volume, more particularly described as follows, to wit; about 365 gallons of whiskey, 45 gallons of brandy, 15 gallons of vermouth, 24 gallons of gin, 24 gallons of benedictine and 15 gallons of champagne, on which there is a duty imposed by law and all of which merchandise was then and there subject to said duty by law; which said merchandise should have been invoiced, without then and there paying or accounting for said duty or any part thereof, and without having the said merchandise or any part thereof, invoiced; in violation of Section 593 of the Tariff Act of 1922". (Trans. Rec., pages 21, 22.) The third count attempted to charge that the defendants, at the same time and at the same place,

as set forth in the second count, "did knowingly, wilfully, and feloniously and with intent to defraud the revenues of the United States, smuggle and clandestinely bring, import and introduce into the United States, to wit: the State of California, at the County of Los Angeles, from a foreign country, to wit, the Dominion of Canada, certain goods, wares and merchandise, to wit; intoxicating liquors more fully described as follows, to wit: about 365 gallons of whiskey, 45 gallons of brandy, 15 gallons of vermouth, 24 gallons of gin, 24 gallons of benedictine and 15 gallons of champagne, on which there is a duty imposed by law; said intoxicating liquors then and there containing alcohol in excess of one-half of one per cent by volume, the importation of which said intoxicating liquors into the United States was then and there forbidden except on a permit issued therefor by the Commissioner of Internal Revenue of the United States, without having first obtained the permit from the said Commissioner of Internal Revenue of the United States to import and bring the said intoxicating liquors into the United States, that is to say, the said defendants did knowingly, wilfully, unlawfully and feloniously and without first obtaining a permit from the Commissioner of Internal Revenue of the United States, transport and clandestinely smuggle, carry and convey the said quantities of intoxicating liquors on board the gasoline power boat "Nagai" from the Dominion of Canada into the United States, at a point near

the City of Long Beach, County of Los Angeles, within the State, Division and District aforesaid; in violation of Section 593 and Section 813 of the Tariff Act of 1922." (Trans. Rec., pages 23 and 24.) The fourth count charged the defendants with another violation of Section 37 of the Criminal Code of the United States in entering into a conspiracy at or near the same place and at the same time set forth in the first count of the indictment to violate the Act of October 28, 1919, in three different respects at or near Los Angeles. In this count, seven overt acts are pleaded in furtherance of the conspiracy set forth therein. (Trans. Rec., pages 24 to 31.)

The defendant, Alexander B. Stewart, upon his arraignment pleaded "Not Guilty". (Trans. Rec., pages 32, 33.)

The cause proceeded to trial on the 21st day of January, 1925. After the impanelment of the jury, but before the taking of testimony, on the motion, it must be confessed of the attorneys for the defendants, joined in by counsel for the Government, the court ordered the words "feloniously and" stricken from the second and third counts of the indictment and further ordered the words "and feloniously" stricken out of another portion of the third count of the indictment. (Trans. Rec., pages 43 and 134.) A line was run through the words "feloniously and" in the second count of the indictment; lines were also run through the words

"feloniously and" and "and feloniously" in the third count of the indictment. The initials of some of the counsel for the defendants and the Government were placed on the indictment in each instance where the words set forth were stricken out as appears by the Transcript of the Record, pages 21-23-24. The purpose of the court for its action in striking out the objectionable words, was that the offenses charged in Counts II and III of the indictment were set forth as felonies, when in reality they were described by the Tariff Act of 1922 itself, as misdemeanors. However, the defendant, Stewart, was tried on an instrument purporting to be an indictment of the Grand Jury in two counts, of which at least, the court changed the nature of the offenses set forth therein without the consent of the Grand Jury returning the indictment or without re-submitting it to the Grand Jury for its further consideration. The defendant Stewart, was therefore tried on an indictment or instrument purporting to be such, which was not the indictment of the Grand Jury returning same.

During the trial the widest latitude was allowed the Government in introducing hearsay and other objectionable testimony, to substantiate the conspiracy charges set forth in the indictment, while no restriction of this testimony was made as to its application to the altered counts containing alleged substantive violations of the Tariff Act of 1922, or Stewart's connection therewith. As a

consequence, when the trial was concluded on the 31st day of January, 1925, the jury acquitted the defendant Stewart on the counts charging him and others with conspiracy, while it convicted him of the charges contained in counts two and three of the indictment as altered by the court (Trans. Rec., page 68), though the charges set forth in the last mentioned changed counts were designated and charged as overt acts numbers I, II and VI in furtherance of the conspiracy set forth in the first count of the indictment and as overt acts numbers V and VI in furtherance of the other conspiracy set forth in the fourth count of said indictment. (Trans. Rec., pages 15, 16, 18, 20, 21, 22, 23, 29 and 30.)

The cause was continued for judgment to the 14th day of February, 1925, at which time the defendant moved for a new trial and in arrest of judgment, each of which motions were ordered by the court denied, whereupon the court sentenced the defendant, Alexander B. Stewart, to pay a fine in the sum of Twenty-five Hundred Dollars on the second count of the indictment, as altered and to pay a fine of Five Thousand Dollars on the third count of the indictment, as altered, and stand committed to the Orange County jail for a period of four months on the amended third count.

A writ of error was thereafter sued out by plaintiff in error, Stewart, to review the judgment and proceedings of the trial court.

II.

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

The court erred in entering said judgment and imposing sentence upon said verdict of guilty in the manner and form as done.

II.

The court erred in entering judgment and imposing sentence upon said verdict of guilty on counts two and three of the indictment.

III.

The court erred in pronouncing judgment upon said verdict.

IV.

The verdict is contrary to law.

V.

The verdict is contrary to evidence.

VI.

The verdict is contrary to the law and the evidence.

III.

ARGUMENT.

I.

THE VERDICT WAS CONTRARY TO LAW. THE CONVICTION OF PLAINTIFF IN ERROR ON THE SECOND AND THIRD COUNTS OF THE INDICTMENT AS ALTERED BY THE COURT WAS A NULLITY.

The United States Grand Jury of the Southern Division of the United States District Court for the Southern District of California, an institution established by the Fifth Amendment to the United States Constitution, duly selected for service in the January, 1924 Term of the court for the Southern Division of the United States District Court of the Southern District of California, returned an indictment against plaintiff in error, Stewart, and others charging them with the commission of four infamous crimes set forth in as many counts. Each offense charged therein was punishable by a term of imprisonment, not exceeding two years and by the imposition of heavy fines.

Under Section 5541 of the Revised Statutes of the United States any of these offenses, no matter how characterized by Congress, was punishable in a State or Federal penitentiary if the sentence of the trial court exceeded a period longer than one year.

And it is the law, that crimes punishable in a state prison or Federal penitentiary, with or without hard labor are infamous crimes for which persons cannot be held to answer in the Federal courts

otherwise than on presentment or indictment of a Grand Jury.

Breede v. Powers, 263 U. S. 4, on page 10;
United States v. Moreland, 258 U. S. 433;
Mackin v. United States, 117 U. S. 348;
Ex parte Wilson, 114 U. S. 417;
Blanc v. United States, 258 Fed. 921; C. C. A. 9th Cir.

But it is true, however, that counts two and three of the indictment as returned by the Grand Jury in the charging part of same designated the offenses set forth therein as felonies, in violation of Section 593 of the Tariff Act of September 21, 1922; 42 Stat. 982; when in fact the section last cited, describes these offenses as misdemeanors, or violations of the law not carrying with them a deprivation of civil rights or full rights of citizenship, though none the less infamous on account of the character of the punishment prescribed.

Upon the trial of the cause, upon the motion of counsel for the defendants, seconded by the United States Attorney, the court ordered the word "feloniously" stricken out where ever it appeared in either of said counts. (Trans. Rec., p. 134.)

These words were actually stricken from counts two and three of the indictment; in this behalf the indictment of the Grand Jury was actually altered by the permission and order of the court, without ordering the indictment re-submitted to the Grand Jury, which returned it, six months after its pre-

sentment and return and long after the life of the Grand Jury returning same had been spent.

The effect of the court's action was to change in a substantial manner the nature of the offenses charged in said counts as completely, as the nature of the charge of murder would be changed, if the court in that supposititious case had stricken out the words (malice aforethought) in an indictment charging that crime.

The Grand Jury in the instant case in counts two and three of its indictment intended to charge plaintiff in error, Stewart, and the other defendants with the crime of felony, because it was most probably advised by the United States Attorney that a violation of the Tariff Act constituted felony. It is not unreasonable to assume, that if the Grand Jurors were advised, that the violations of the Tariff Act were looked upon by the Congress passing the statute only as misdemeanors, that they would be very reluctant to indict the defendant Stewart for misdemeanors carrying with them penitentiary sentences. And who can say, that if they were properly advised in this regard, they would not have hesitated to charge the defendant Stewart with the crime of conspiracy (a felony) to commit two misdemeanors. It cannot be gainsaid, that they might have viewed the situation as the learned Chief Justice of the United States regards the policy of charging persons with conspiracies to commit mere misdemeanors.

The court's action, in causing the alteration of counts two and three of the indictment, was a flagrant usurpation of the functions of the Grand Jury, no matter what were the circumstances inducing its conduct. When the indictment was altered, in these counts, there was nothing for the court to try in that behalf. The court lost jurisdiction thereof as completely as though the indictment had been dismissed or a nolle prosequi entered. There was nothing before the court upon which it could hear evidence or pronounce sentence.

Nevertheless, the case proceeded to trial, verdict and sentence, and the defendant was acquitted of the counts charging conspiracy, but was convicted of the charges contained in the very counts altered by the court, and was illegally sentenced thereunder to a term of imprisonment in the county jail and to pay fines in the sum Seven Thousand Five Hundred Dollars. This question is a jurisdictional one, where the defendant Stewart could resort to the remedy of habeas corpus as in the case of *Ex parte Bain,* 121 U. S. page 1, if actually undergoing deprivation of liberty thereunder. It has been repeatedly held;

A Party Can Only Be Tried Upon the Indictment Found By the Grand Jury, and Especially Upon Its Language Found in the Charging Part of the Instrument. A Change in the Indictment Deprives the Court of the Power of Proceeding to Try the Accused. There is Nothing Before

THE COURT ON WHICH IT CAN HEAR EVIDENCE OR PRONOUNCE SENTENCE.

Ex parte Bain, 121 U. S. 1; 30 Law Ed. 849;
DeLucca v. United States, 299 Fed. 741; C. C. A. 2nd Circuit;
Katz v. United States, 273 Fed. 157; C. C. A. 1st Circuit;
Dodge v. United States, 258 Fed. 300; C. C. A. 2nd Circuit;
Naftzer v. United States, 200 Fed. 497; C. C. A. 8th Circuit;
United States v. Dembowsky, 252 Fed. 898;
United States v. Munday, 211 Fed. 536;
United States v. Harmon, 34 Fed. 872.

The case of *Ex parte Bain,* cited supra, is the leading case upon the subject matter under discussion. It is particularly valuable here, because it was decided by the United States Supreme Court on March 28, 1887, fifteen years after the enactment of Section 1025 of the Revised Statutes which section, was passed on June 1, 1872. The doctrines promulgated by the United States Supreme Court have never since been departed from, and have been followed and applied in all of the cases cited supra.

In the *Bain* case, there was an indictment containing a single count charging a number of defendants, including Bain, with violating a section of the Revised Statutes which governed the operation and control of banks and banking and

which required certain reports to be made in conformity with its mandates. In the indictment there appeared this allegation:

> "and that they, and each of them, made said false statement and report in manner and form as above set forth with intent to deceive *the Comptroller of the currency and* the agent appointed to examine the affairs of said association and to injure, deceive and defraud the United States, etc."

The words here italicized were in reality surplusage. Upon motion of counsel for the United States, the court ordered that the indictment be amended by striking out the words *"The Comptroller of the currency and"*. The question was taken to the United States Supreme Court on a petition for a Writ of Habeas Corpus, which was granted by the court.

Justice Miller, in a very learned opinion, wherein he reviewed exhaustively the many English and American authorities on the subject, in holding the indictment a nullity and the trial thereon less, concluded his decision in the following language:

> *"It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand*

jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney: for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime: for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer', he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in Ex parte Lange, 85 U. S. 18 Wall. 163 (21:872); Ex parte Parks, 93 U. S. 18 (23:787); Ex parte Wilson (supra), and other cases."

Similarly the United States Circuit Court of Appeals of the Second Circuit held in the case of *Dodge v. United States,* 258 Fed. p. 300. In that

case, the facts are identical with the instant case, as far as the question under discussion is concerned. There the defendant was indicted for violations of the Espionage Act. The indictment contained four counts. The rest of the facts are cited with the law in the portion of the opinion which we will now quote: It is to be found on page 305 of Volume 258 of The Federal Reporter and is as follows:

> *"At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word 'mutiny' from the first paragraph of the second count. Counsel for defendant at once said: 'No objection.' The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted The rule is almost universally recognized, both in this country and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the court.*
>
> *The Supreme Court in Ex parte Bain, 121 U. S. 1; 7 Sup. Ct. 781; 30 L. Ed. 849, declared that it was beyond question that in the English courts indictments could not be amended, and that no authority had been cited in the American courts which sustained the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. In that case the trial court amended the indictment by striking out six words as being surplusage. The Supreme Court held that this deprived the court of power to try the prisoner. There was only one count in the indictment in that case. And the court said:*

'The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered.'

"We therefore hold in the instant case that the amendment made in the first two counts deprived the court of power to proceed upon those counts; but this did not affect the right to try the defendant upon the third and fourth counts. As the jury acquitted on the fourth count, the question is as to the validity of the third count. That count is well drawn, and the conviction under that count must be sustained unless the Espionage Act is unconstitutional."

Again, the same Circuit Court of Appeals held in the case of *De Lucca v. United States,* 299 Fed. 744, as follows:

"The effect of the severance in a conspiracy indictment was to grant separate trials to the defendants accused in that indictment. The defendants remained the same and the indictment remained unchanged. Assuming that a severance had been granted, as argued, as to both indictments, still it was error to grant the consolidation of the indictments. The statute makes the test what appears on the face of the bills themselves. It does not depend in any degree upon the order in which the prosecutor intends to bring the defendants to trial. Both indictments charge crimes punishable by imprisonment for more than one year, and are therefore infamous crimes. Breede v. Powers, 263 U. S. 4; 44 Sup. Ct. 8; 68 L. Ed. .....; In re Classen, 140 U. S. 200; 11 Sup. Ct. 758; 35 L. Ed. 399. There were still accusations made against five defendants in one case and nine defendants in the other. Neither the court nor the government's attorney had the

> power to add anything to the indictment or to strike anything out of it. Ex parte Bain, 121 U. S. 1; 7 Sup. Ct. 781; 30 L. Ed. 849. The Fifth Amendment of the Constitution requires that the accusation should be that charged in the indictment as found by the grand jury. The only way it could be changed would be by re-submission to the grand jury."

PLAINTIFF IN ERROR STEWART COULD NOT WAIVE HIS CONSTITUTIONAL RIGHT TO BE TRIED FOR INFAMOUS CRIMES ON THE INDICTMENT AS RETURNED BY THE GRAND JURY; NEITHER COULD HIS COUNSEL WAIVE THAT RIGHT FOR HIM.

It is true, that if Stewart desired to do so, he could plead guilty to the charges contained in the indictment, but when he elected to go to trial, he could only be tried in the manner provided by the United States Constitution. His counsel, for instance, could not stipulate the trial court, the power to try him, without the aid of a jury. Neither could he be legally tried, even if he consented thereto, by a jury of less than twelve men. Any other rule would soon lead to the utter disregard of all constitutional rights, and guarantees.

This Circuit Court of Appeals in the case of *Blair v. The United States,* 241 Fed. 217, held

The constitutional right of a person charged with crime to a trial by jury is the right to a trial by jury according to the course of the common law, which right cannot be waived and a court is without power in a criminal case to instruct the jury

peremptorily to find the accused guilty, although the case is submitted on an agreed statement of facts, without other evidence.

The court holding on page 230 of the Report, as follows:

> "The constitutional right thus secured to one charged with crime means a trial by jury according to the course of the common law, which right cannot even be waived. Thompson v. Utah, 170 U. S. 343, 346, 349, 353; 18 Sup. Ct. 620; 42 Law. Ed. 1061; Freeman v. United States 227 Fed. 732; 142 C. C. A. 256. And in the case of Sparf and Hansen v. United States 156 U. S. 51, 105; 15 Sup. Ct. 273-294 (39 L. Ed. 343), the Supreme Court distinctly adjudged that:
>
> > 'It is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense as charged or of any criminal offense less than that charged.'
>
> "See, also, Atchison, T. and S. F. Ry. Co. v. United States, 172 Fed. 194; 96 C. C. A. 646; 27 L. R. A. (N. S.) 756; United States v. Taylor (C. C.), 11 Fed. 470."

The principle here laid down applies with equal force to the case at bar, unless the Sixth Amendment to the United States Constitution is of more vital importance to the protection of life, liberty and the pursuit of happiness than the Fifth Amendment to the said Constitution.

IV.

CONCLUSION.

It is respectfully submitted for the reasons stated in this brief, that the trial of plaintiff in error Stewart on counts two and three of the indictment, was a nullity from the time, that the court, by its order, altered the charging portion of each of said counts. And for that reason alone, the judgment of conviction of the defendant, Alexander B. Stewart on said counts two and three should be reversed.

Dated, February 17, 1926.

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